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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FLF, INC., et al. Plaintiffs and Appellants, v. BARNEY & BARNEY, LLC, et al., Defendants and Respondents.	A131131; A132329 (Alameda County Super. Ct. No. RG08423393)

INTRODUCTION

In these consolidated cases, plaintiffs FLF, Inc., doing business as Diversified Risk Insurance Brokers (Diversified) and Hub International of California Insurance Services Inc. (HUB) appeal from a judgment of the Alameda County Superior Court in favor of defendants Barney & Barney, LLC, doing business as Saylor & Hill (Saylor) and Marcia McCune (case No. A131131) and from the attorney fees awarded to McCune (case No. A132329). Judgment followed the court's striking of plaintiffs' unfair competition claim; its sustaining without leave to amend of demurrers to plaintiffs' causes of action against McCune for breach of contract, breach of fiduciary duty, and fraud and deceit, and to causes of action against Saylor for inducement to breach contract, breach of fiduciary duty, and fraud and deceit; and the court's grant of summary judgment in favor of McCune on the remaining claim of promissory estoppel against her.

Plaintiffs contend the court erred in ruling the noncompetition and nonsolicitation provisions of the employment agreement between plaintiffs and McCune invalid under

Business and Professions Code section 16600, [1] and in sustaining the demurrers and granting summary judgment on that basis. [2] Plaintiffs further contend the court erred in failing to sever any unenforceable part of the agreements from enforceable provisions, and further allege that we should reverse the judgment and remand with instructions to allow them to amend to attempt to state causes of action for misappropriation of trade secrets and unfair competition. Finally, plaintiffs challenge the attorney fee award to McCune.

We shall conclude plaintiffs should be allowed to amend their complaint to attempt to state a cause of action for misappropriation of trade secrets.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Parties*

Diversified is an insurance brokerage firm based in Emeryville, California. From 1978 until 2008, Diversified employed McCune. McCune began her employment with Diversified as an account manager, eventually becoming an insurance broker. As a broker, McCune acquired a book of business accounts wherein she sold and renewed insurance policies to clients. In 1981, McCune was promoted to vice president and was offered the opportunity to obtain an escalating ownership interest in her book of business.

Defendant Saylor, too, is an insurance brokerage firm. Beginning in 1996 and for more then 10 years, Diversified engaged in intermittent merger discussions with other business entities, including Saylor. In November 2007, Diversified was acquired by insurance brokerage firm HUB. HUB ran the existing brokerage as a joint operation of Diversified and HUB, in anticipation of a formal merger, which occurred on January 1, 2009.

In April 2008, McCune was offered a position with Saylor. She resigned from HUB on June 2, 2008, to take that position, bringing her book of business with her to

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[1] All statutory references are to the Business and Professions Code, unless otherwise indicated.

[2] Plaintiffs do not contend the court erred in sustaining the demurrer as to the causes of action for fraud and deceit.

Saylor. At the time this action was initiated and judgment was entered, McCune was employed by Saylor.

B. *The Agreements*

1. *Agreements with McCune.* In 1981, McCune became a broker or "producer" with Diversified. She and Diversified entered into an employment agreement (Agreement) on September 21, 1981. The Agreement addressed the terms the parties agreed would govern their relationship, including, among other things, a recital of duties, the term, and compensation. Section 5 of the Agreement stated as follows:

"5. Trade Secrets. BROKER acknowledges and agrees that any and all information concerning the insurance business developed by [Diversified] and acquired by BROKER while under contract, or in the employ of [Diversified] is and shall remain the sole property of [Diversified] and constitutes a secret and confidential communication. Except as otherwise set forth in this Agreement, it is agreed that such information includes, without limitation thereto, names of clients and lists of properties as well as financial information pertaining thereto, files, records, and insurance policies maintained by [Diversified] including interoffice memoranda, mailing lists, manuals, forms, procedural information, and other records, all of which have been developed at substantial expense to [Diversified]. The disclosure of any such confidential information or the removal or copying of any information obtained from [Diversified] without [Diversified's] express written consent shall be grounds for termination of this Agreement and shall entitle [Diversified] to injunctive relief and an award of punitive damages as in the court's discretion. All such lists of prospective customers and their renewals and expirations dates, and all [Diversified's] records, such as manuals, rate books, account books, and other material furnished to BROKER by [Diversified] are the sole and exclusive property of [Diversified] and shall be promptly delivered to [Diversified] upon termination of this Agreement."

Section 6 of the Agreement includes a "noncompetition" covenant and formula for a buyout for release of the provision as follows:

"6. Covenant Re Competition.

"a. In the event of termination of this Agreement, regardless of the reasons for termination or by whom terminated or upon expiration of this Agreement, BROKER agrees and hereby covenants ("the Covenant") as follows: that for the term and areas described below, he/she will not directly or indirectly, either as an individual, employee, agent, partner or in a corporate capacity solicit or accept the customers, trade or business affairs of [Diversified] expirations nor interfere with normal [Diversified] processing of insurance business procured by BROKER during the course of his/her employment either originally or through renewal of any [Diversified] business. The Covenant shall be effective in the California counties of Alameda, Contra Costa, Marin, San Francisco, San Mateo, San Jose, Santa Clara, and Solano until the last to occur of, (i) the end of the fifth (5th) year following the expiration or termination of this Agreement; or (ii) the date on which BROKER pays to [Diversified] all unpaid loans or advances and a sum computed as follows: [Diversified]'s percentage of vested interest calculated pursuant to Exhibit A as of the date of expiration or termination of this Agreement, multiplied by one hundred fifty percent (150%) of the total annual commissions paid to [BROKER] within the last twelve (12) months prior to such expiration or termination. Upon payment in full pursuant to Section (ii) above, BROKER shall be deemed released from the Covenant as to those clients for whom commissions were utilized in the calculations set forth above; following such payment, [Diversified] shall not solicit business from said clients for a period of five (5) years from the date of termination.

"In the event BROKER elects not to pay the sum so calculated to acquire [Diversified]'s interest, then provided [Diversified] is willing to acquire all or any portion of BROKER'S interest, [Diversified] shall be entitled to do so by the payment to BROKER of either a sum computed on the basis of the formula described in section (ii) above utilizing BROKER'S percentage of vested interest or such other lesser sum as may be agreed upon in writing between the parties. Following payment by [Diversified] pursuant hereto, BROKER shall fully comply with the Covenant as set forth above.

"BROKER shall have fifteen (15) days from the expiration or termination of this Agreement within which to elect, in writing, to acquire [Diversified]'s interest and pay

[Diversified] therefor. Following such period, [Diversified] shall have fifteen (15) days within which to elect, in writing, to acquire BROKER'S interest and to pay BROKER therefor.

"b. BROKER agrees that she/he shall not seek or accept any contract as an agent, employee, or independent contractor with any insurance company represented by [Diversified] while employed by [Diversified], nor shall she/he, after termination or expiration of this Agreement seek or accept any agency, employment, or independent contractor contract with any insurance company represented by [Diversified] without specific written consent of [Diversified].

"BROKER agrees that she/he will not directly or indirectly offer employment to, or become associated with any employee or former employee or any of [Diversified]'s employees or former employees for the purpose of engaging in the insurance agency or the brokerage business."

Exhibit A to the Agreement recites McCune's compensation and the vested interests of McCune and Diversified in the gross annual commissions produced by McCune under the Agreement. Exhibit A shows McCune's initial vested interest at zero percent (0%) in 1981. Upon revision of Exhibit A in 1984 by Diversified and McCune, the addendum showed the growth of McCune's vested interest in the annual paid commissions over the course of three years. By 1986, McCune's vested interest in the annual paid commissions (her book of business) was stated as fifty percent (50%). It remained at that level for the duration of her employment at Diversified. The other fifty percent interest belonged to Diversified.

In 1996, Diversified and McCune entered into an addendum to the Agreement, amending section 6. The 1996 addendum provided in relevant part: "ITEM 6 SUBSECTION a. (ii) of the 'Covenant Re Competition' IS AMENDED AS FOLLOWS: 'or (ii) the date on which BROKER pays to [Diversified] all unpaid loans or advances and a sum computed as follows: [Diversified]'s vested interest as of the date of expiration or termination of this Agreement, multiplied by one hundred fifty percent

(150%) of the total annual commissions or fees produced by the Broker within the last 12 months prior to such expiration or termination.' "[3]

In January 2003, McCune prepared an addendum in anticipation of her future retirement (the 2003 addendum) and the possible sale of Diversified. Although she expressed a willingness to continue to work for Diversified post acquisition, the 2003 addendum stated that in the event of her voluntary termination, evidenced by 60 days' written notice, Diversified agreed to pay McCune for transferring to it or its successor, her vested interest in the employment agreement: "From [the] date of termination for 24 months at a rate of 37.5% of paid commission." The 2003 addendum also contained "clarifying conditions" to which the parties agreed, including, "All accounts are owned by [Diversified] and [are] intellectual property of [Diversified]" and that "[a]ll other provisions and revisions of the employment agreement survives this addendum and remains in force."

In August or September 2007, prior to the acquisition of Diversified by HUB, McCune sought assurance from Diversified and HUB that the Agreement, as amended, was and would be still in effect should HUB complete the purchase of Diversified. She received these assurances and, in return, orally affirmed her promise to sell her book of business to Diversified upon ceasing employment and stated her intentions to stay with the merged entity. Relying in part on these promises and those contained in the Agreement, as amended, Diversified and HUB moved forward with the sale of stock to HUB.

2. *Confidentiality agreement between Diversified and Saylor.* From 1996 through 2007, Diversified and Saylor had intermittent merger and acquisition discussions. The parties shared with each other confidential information, including trade secrets. In 1996, Diversified and Saylor executed a "Confidentiality Agreement and Letter Not to Compete." They agreed to share "sensitive information and material regarding finances,

[3] This addendum is not germane to the issues here, as it merely substitutes the language "total annual commissions or fees produced by the BROKER" for the former language "total annual commissions paid to the BROKER."

employees, procedures, insurance company relationships, compensation and clients; they agreed that disclosure of information directly or indirectly to third parties would "result in significant financial loss as well as impaired business reputation." Therefore, they agreed that "should any disclosure occur or competition for clients or employees occur the injured party will be entitled to injunctive relief and financial damages . . . ."

C. *McCune leaves for Saylor*

In April 2008, McCune was offered a position with Saylor and resigned from HUB on June 2, 2008, to take that position. She took with her substantially her entire book of business. McCune did not offer to sell plaintiffs her book of business and there is no allegation that plaintiffs offered to purchase her book of business pursuant to the amended Agreement.

D. *The complaints, demurrers and summary judgment*

On December 3, 2008, plaintiffs filed a complaint against McCune and Saylor, alleging breach of contract and fiduciary duty against McCune, and inducement to breach contract and breach of fiduciary duty against Saylor. Defendants demurred and plaintiffs filed a first amended complaint alleging an additional claims for fraud and deceit and promissory estoppel against McCune. Defendants again demurred and the trial court overruled the demurrer as to the promissory estoppel claim and sustained the demurrer as to all other claims, with leave to amend.

Plaintiffs filed a second amended complaint, adding a new claim for unfair competition against both defendants. This time the trial court struck the cause of action for unfair competition, as having been filed without leave of court, denied the demurrer to the promissory estoppel cause of action and sustained defendants' demurrers to all other causes of action, without leave to amend. The court ruled that the noncompete provision of the contract invalidated the contract under section 16600, and that the complaint failed to state facts supporting the two narrow statutory exceptions under sections 16601 and 16602. The court also "note[d] that Plaintiffs[']additional facts and argument regarding misappropriation of trade secrets may constitute a separate cause of action but does not support the causes of action subject to demurrer here." The court dismissed defendant

Saylor from the action and directed McCune to file her answer to the promissory estoppel cause of action.

McCune filed her answer and moved for summary judgment on the remaining promissory estoppel cause of action. The trial court granted summary judgment on August 17, 2010. Judgment was entered against plaintiffs and in favor of defendants on December 9, 2010. Plaintiffs appealed from the judgment on February 7, 2011 (case No.A131131).

E. *AttorneyFees*

On February 14, 2011, defendants moved for attorney fees. The court awarded McCune attorney fees of $63,960.30 based on the contract, pursuant to Civil Code section 1717. In so doing, it ruled that Saylor was not entitled to fees as it was not a party to the Agreement and that McCune was entitled to recover her attorney fees as to the breach of contract and promissory estoppel causes of action, but not for the tort actions. In so doing, the court determined that the promissory estoppel cause of action could be construed as seeking "to interpret or enforce" the Agreement. The court awarded McCune a prorated portion of her fees before the demurrer $4,772.30, separating out fees spent on breach of contract and promissory estoppel claims from other causes of action) and the bulk of her fees incurred following the sustaining of the demurrer. Appellants filed a timely appeal of the attorney fees award (case No. A132329). We consolidated the appeals.

DISCUSSION

I. Standards of Review

A. *Demurrer*

"On appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend, we assume the truth of all properly pleaded facts. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6; [citation].) We also accept as true all facts that may be implied or inferred from those expressly alleged. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403; [citation].)" (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 633, fn. 3.) If the trial court sustains a demurrer without

leave to amend, we determine whether or not plaintiffs could amend the complaint to state a cause of action. (*Id.* at p. 637.) Plaintiffs bear the burden of proving the trial court abused its discretion in denying leave to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Leonard v. John Crane, Inc.* (2012) 206 Cal.App.4th 1274, 1282.) However, plaintiffs may make this showing for the first time on appeal. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) This is so even when the plaintiff failed to request leave to amend in the trial court. (*Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412 (*Kolani*); Code Civ. Proc., § 472c, subd. (a).)

Finally, " '[w]e do not review the reasons for the trial court's ruling; if it is correct on any theory, even one not mentioned by the court, and even if the court made its ruling for the wrong reason, it will be affirmed. [Citations.]' (*Coastside Fishing Club v. California Resources Agency* (2008) 158 Cal.App.4th 1183, 1190-1191.)" (*Curcini v. County of Alameda, supra,* 164 Cal.App.4th at pp. 637-638.)

B. *Summary Judgment*

We described the summary judgment standard of review in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253-254: "Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) . . . . [¶] On appeal '[w]e review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citations.]' (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) Put another way, we exercise our independent judgment, and decide whether undisputed facts have been established that negate plaintiff's claims. [Citation.] As we put it in *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 320: '[W]e exercise an independent review to determine if the defendant moving for summary judgment met its burden of establishing a complete defense or of negating each of the plaintiff's theories and establishing that the action was without merit.' (Accord, *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.)"

"But other principles guide us as well, including that '[w]e accept as true the facts . . . in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them.' (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67.) And we must ' "view the evidence in the light most favorable to plaintiff[] as the losing part[y]" and "liberally construe plaintiff['s] evidentiary submissions and strictly scrutinize defendant['s] own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff['s] favor." ' (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97.)" (*Nazir v. United Airlines, Inc., supra*,178 Cal.App.4th at pp. 253-254.)

II. The Noncompete and Nonsolicitation Clauses are Void as a Matter of Law

A. *Section 16600*

Section 16600 provides: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." " 'At least since 1872, a noncompetition agreement has been void unless specifically authorized by sections 16601 or 16602.' (*Bosley* [*Medical Group v. Abramson* (1984) 161 Cal.App.3d 284,] 286 [(*Bosley*)].) These legislative enactments 'settled public policy in favor of open competition and rejected the common law "rule of reasonableness," [and] [t]oday in California, covenants not to compete are void, subject to several exceptions . . . .' (*Edwards*[*v. Arthur Andersen LLP* (2008)] 44 Cal.4th [937,] 945 [(*Edwards*)].)" (*The Retirement Group v. Galante* (2009) 176 Cal.App.4th 1226, 1233-1234 (*The Retirement Group*).) In *Edwards*, the California Supreme Court rejected the argument that narrowly tailored noncompete or nonsolicitation agreements could pass muster under a "narrow-restraint" exception embraced by the Ninth Circuit, stating: "California courts have not embraced the Ninth Circuit's narrow-restraint exception. . . . California courts 'have been clear in their expression that section 16600 represents a strong public policy of the state which should not be diluted by judicial fiat.' [Citation.] Section 16600 is unambiguous, and if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect. We reject [the] contention that we should adopt a narrow-restraint exception to

section 16600 and leave it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600." (*Edwards*, at pp. 949-950, fn. omitted.)

Covenants not to solicit a former employer's customers are treated as covenants not to compete. (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1149; *Dowell v. Biosense Webster, Inc.* (2009) 179 Cal.App.4th 564, 577 (*Dowell*) [invalidating a covenant not to solicit customers with whom employees had contact during their last 12 months of employment for 18 months after employment].)

The three statutory exceptions recognized by our Supreme Court in *Edwards* are "noncompetition agreements in the sale or dissolution of corporations (§ 16601), partnerships (*ibid.*; § 16602), and limited liability corporations (§ 16602.5)." (*Edwards, supra,* 44 Cal.4th at pp. 945-946.)

Plaintiffs maintain that the noncompete clause is valid and enforceable under the statutory exceptions set forth in section 16601 for the sale of goodwill of a business and section 16602 for dissolution of a partnership, as well as under an asserted common law exception to protect trade secrets. We are not persuaded.

B. ***Section 16601- sale of goodwill or ownership of a business***[4]

"Section 16601 provides one of the narrow exceptions to section 16600. (*Kolani*[, *supra,*] 64 Cal.App.4th 402, 407.)" (*Hill Medical Corp. v. Wycoff* (2001) 86 Cal.App.4th 895, 901 (*Hill Medical Corp.*).) Pursuant to section 16601, "any person selling the goodwill of a business, or any owner of a business selling all of his or her ownership interest in a business, or substantially all of its operating assets together with the

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[4] Section 16601 provides in full:

"Any person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interest in the business entity, or any owner of a business entity that sells (a) all or substantially all of its operating assets together with the goodwill of the business entity, (b) all or substantially all of the operating assets of a division or a subsidiary of the business entity together with the goodwill of that division or subsidiary, or (c) all of the ownership interest of any subsidiary, may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold, or that of the business entity, division, or subsidiary has been carried on, so long as the buyer, or any person deriving title to the goodwill or ownership interest from the buyer, carries on a like business therein.

"For the purposes of this section, 'business entity' means any partnership (including a limited partnership or a limited liability partnership), limited liability company (including a series of a limited liability company formed under the laws of a jurisdiction that recognizes such a series), or corporation.

"For the purposes of this section, 'owner of a business entity' means any partner, in the case of a business entity that is a partnership (including a limited partnership or a limited liability partnership), or any member, in the case of a business entity that is a limited liability company (including a series of a limited liability company formed under the laws of a jurisdiction that recognizes such a series), or any owner of capital stock, in the case of a business entity that is a corporation.

"For the purposes of this section, 'ownership interest' means a partnership interest, in the case of a business entity that is a partnership (including a limited partnership a limited liability partnership), a membership interest, in the case of a business entity that is a limited liability company (including a series of a limited liability company formed under the laws of a jurisdiction that recognizes such a series), or a capital stockholder, in the case of a business entity that is a corporation.

"For the purposes of this section, 'subsidiary' means any business entity over which the selling business entity has voting control or from which the selling business entity has a right to receive a majority share of distributions upon dissolution or other liquidation of the business entity (or has both voting control and a right to receive these distributions.)"

business's goodwill, 'may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold, or that of the business entity, . . . has been carried on, so long as the buyer, [or any person deriving title to the goodwill or ownership interest from the buyers,] carries on a like business therein.' " (*NewLife Sciences v. Weinstock* (2011) 197 Cal.App.4th 676, 688.) " 'Where a covenant not to compete is executed as an adjunct of a sale of a business there is an inference that the business had a "goodwill" and that it was transferred.' [Citation.]" (*Ibid.*) "Section 16601 reflects that when the goodwill of a business is sold, it would be ' "unfair" for the seller to engage in competition which diminishes the value of the asset he [or she] sold.' [Citations.]" (*Hill Medical Corp.*, at p. 902.) "The reason for this exception to the general rule against noncompetition covenants is to prevent the seller from depriving the buyer of the full value of its acquisition, including the sold company's goodwill. (*Strategix* [*Ltd. v. Infocrossing West, Inc.* (2006)] 142 Cal.App.4th [1068], 1073.)" (*Alliant Insurance Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1301.)

Defendants argue that section 6a of the Agreement was entered in anticipation of the sale of a business asset (McCune's book of business) and the goodwill associated with that book of business by either McCune or Diversified and that, as such, it falls within the section 16601 exemption from the prohibition on noncompetition agreements and nonsolicitation agreements.

The statutory exceptions have been described as "narrow." (See *Hill Medical Corp., supra,* 86 Cal.App.4th at p. 901; *Kolani, supra,* 64 Cal.App.4th at p. 407.) Section 16601 applies when the purchaser of a company seeks to enforce the noncompetition agreement against the person or entity from which it has purchased the business. "[I]n order to uphold a covenant not to compete pursuant to section 16601, the contract for sale of the [company or its] corporate shares may not circumvent California's deeply rooted public policy favoring open competition. The transaction must clearly establish that it falls within this limited exception." (*Hill Medical Corp.*, at p. 903.) In the context of corporate shareholders, "the sale of the fractional interest must involve 'a substantial interest in the corporation so that the owner, in transferring "all" of his [or her] shares,

can be said to transfer the goodwill of the corporation.' (*Bosley*[,] *supra,* 161 Cal.App.3d at p. 290).)" (*Hill Medical Corp*.. at p. 904.)

The purchase of McCune's book of business would not have been the purchase of the entire business or its goodwill. (See *Golden State Linen Service, Inc. v. Vidalin* (1977) 69 Cal.App.3d 1, 11 ["[T]he Legislature intended the pertinent term in section 16601 ('[a]ny person who sells the goodwill of a business') to mean and include only a person who owns and sells the business. [Citations.] As a matter of legislative intent, therefore, the term may not be construed to include a departing employee for purposes of invoking the section 16601 exception to section 16600"].)

Bosley, supra, 161 Cal.App.3d 284, is instructive in this regard. *Bosley* held that this exception would not apply to a "sham" business transaction wherein a physician, working for a medical group, was required to buy a small percentage of the shares of the medical group, resell them to the medical group and its principal shareholder when he left (for the purchase price, plus 10 percent), and not compete with the corporation for three years. "*Bosley* rejected a literal interpretation of section 16601 that permitted the enforcement of a covenant not to compete made in conjunction with the sale of 'all' of a shareholder's shares. *Bosley* reasoned that '[l]iterally applied, section 16601 would permit a major public corporation to require any employee to purchase one of several million shares and to enter into an agreement not to work for a competitor—an absurd result, and contrary to this state's policy prohibiting such agreements. Even on the facts of this case, a literal interpretation of section 16601 leads to a mischievous and absurd result.' (*Bosley*,. at p. 291.)" (*Hill Medical Corp., supra,* 86 Cal.App.4th at p. 905.)

Here, plaintiffs have not alleged that the Agreement containing the noncompetition clause, originally executed in 1981, arose in connection with the sale of the business or its goodwill. Nor are there allegations from which the court could conclude that the noncompetition agreement was executed in connection with the sale of the brokerage firm or its goodwill. The second amended complaint does not allege that McCune purchased any goodwill or assets of the business at any time. Nor do plaintiffs allege that McCune was a shareholder or that she enjoyed any control over corporate

activities. The facts alleged in the second amended complaint do not indicate that McCune was anything more than a commissioned salesperson with a roster of clients. (That McCune had the title of "vice president" in this context does not imply otherwise, as there are no factual allegations as to what that title means in the context of this or any insurance brokerage firm.)

Nor do we accept plaintiffs' assertions that the "book of business" is equivalent to a significant ownership interest in the insurance brokerage firm or to its goodwill. It appears, rather, that McCune's book of business was one part of plaintiffs' business operations—analogous to the small percentage of company shares that were sold in *Bosley, supra,* 161 Cal.App.3d 284. As defendants observe, if client lists or a "book of business" are the equivalent of a "business entity," every commissioned salesperson in California could be prevented from competing, because any employer could call its client list a "business" and require the purchase and sale of the list as a condition of employment. The "narrow exception" afforded by section 16601 would swallow the rule. Such arrangement is contrary to California's strong public policy in favor of employee mobility.

C. *Characterization of the relationship between McCune and Diversified/HUB as a "partnership" (§§ 16601, 16602)*

Nor are we persuaded by plaintiffs' characterization of the relationship between McCune and Diversified/HUB as a "partnership." Plaintiffs argue McCune and Diversified/Hub were "partners" in her book of business, so that the noncompetition agreement was valid under both the sale of a business exception of section 16601 (where the business is a partnership) and the dissociation of a partner from the partnership exception of section 16602.

Section 16601 is inapplicable for all of the reasons we stated above.

Section 16602 provides: "(a) Any partner may, upon or in anticipation of any of the circumstances described in subdivision (b), agree that he or she will not carry on a similar business within a specified geographic area where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving

title to the business or its goodwill from any such other member of the partnership, carries on a like business therein.

"(b) Subdivision (a) applies to either of the following circumstances: [¶] (1) A dissolution of the partnership. [¶] (2) Dissociation of the partner from the partnership."

The characterization of plaintiffs and McCune as "partners" in her book of business, is a conclusion, not an allegation of fact, and no facts appear in the second amended complaint that would indicate McCune was a "partner" in the brokerage firm in the sense intended by section 16602.

Moreover, the second amended complaint is devoid of factual allegations that the parties executed the Agreement and its noncompetition provision in 1981, "*upon or in anticipation of* a dissolution of the partnership[.]" (§ 16602, italics added.) Indeed, when the Agreement containing the noncompetition clause was initially entered into by McCune, she had *no vested interest* at all in her book of business. Further, she did not leave the brokerage firm until 2008—27 years later. Such an interpretation of the statute would discourage mobility of employees by allowing *any* commissioned salespersons with a book of business or client list to be characterized as a "*partner*," not in the firm or company, but *in that book of business*, thereby binding that salesperson upon separation from the employer to a noncompetition covenant. Similar to our observation with respect to the "narrow exception" afforded by section 16601, if the exception of section 16602 applies in this instance, once again, the exception would swallow the rule, contrary to California's strong public policy in favor of employee mobility.

D. *Trade secret "exception"*

Plaintiffs argue that a common law trade secret exception exists that allows an employer to enforce a noncompetition/nonsolicitation agreement to protect trade secrets.

"Although *Edwards* reaffirmed the broad California rule that invalidates noncompetition agreements falling outside of statutorily-prescribed exceptions, *Edwards* expressly stated it was not 'address[ing] the applicability of the so-called trade secret exception to section 16600.' (*Edwards, supra,* 44 Cal.4th at p. 946, fn. 4.)" (*The*

Retirement Group, supra, 176 Cal.App.4th at p. 1236.) *The Retirement Group* and *Dowell, supra,* 179 Cal.App.4th 564, were the first published California cases to discuss *Edwards'*s reference to the "so-called trade secret exception." (*Dowell,* at p. 577.)

The Retirement Group recognized that before *Edwards* an "equally lengthy line of cases has consistently held former employees may not misappropriate the former employer's trade secrets to unfairly compete with the former employer." (*The Retirement Group, supra,* 176 Cal.App.4th at p. 1237.) "[T]he courts have repeatedly held a former employee may be barred from soliciting existing customers to redirect their business away from the former employer and to the employee's new business *if the employee is utilizing trade secret information* to solicit those customers. [Citations.] Thus, it is not the *solicitation* of the former employer's customers, but is instead the *misuse of trade secret information,* that may be enjoined. [Citations.]" (*Id.* at pp. 1237-1238.)

"In reconciling the 'tension' between section 16600 and trade secrets, [*The Retirement Group*] court stated: 'We distill from the foregoing cases that section 16600 bars a court from specifically enforcing (by way of injunctive relief) a *contractual* clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employee's new business, but a court may enjoin *tortuous* conduct (as violative of either the Uniform Trade Secrets Act (Civ. Code, § 3426 et seq.) and /or the unfair competition law) by banning the former employee from using trade secret information to identify existing customers, to facilitate the solicitation of such customers, or to otherwise unfairly compete with the former employer. Viewed in this light, therefore, the conduct is enjoinable *not* because it falls within a judicially created "exception" to section 16600's ban on contractual nonsolicitation clauses, but is instead enjoinable because it is wrongful independent of any contractual undertaking.' [Citation.]" (*Dowell, supra,* 179 Cal.App.4th at p. 577, quoting *The Retirement Group, supra,* 176 Cal.App.4th at p. 1233.) The Court of Appeal in *Dowell* expressed "doubt [as to] the continued viability of the *common law trade secret exception* to covenants not to compete" (*Dowell,* at pp. 577-578, italics added) and we agree this exception rests on shaky legal grounds. (See *Edwards, supra,* 44 Cal.4th at

p. 946, fn. 4; *The Retirement Group,* at pp. 1238-1239; cf. *K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 958 (*K.C. Multimedia*) [common law trade secret claims preempted by Civ. Code §§ 3426-3426.11].)

Even assuming the continued viability of this exception, it has no application here. Plaintiffs argue that whether information is a trade secret is a question of fact, improperly resolved on demurrer. However, at issue here is not whether client lists and other confidential information were trade secrets, but whether the noncompetition and nonsolicitation provisions of the amended Agreement were narrowly tailored to protect any alleged trade secrets. (See, e.g., *Dowell, supra,* 179 Cal.App.4th at p. 579 [trial court could properly determine invalidity of noncompete and nonsolicitation clauses as a matter of law]; *Kolani, supra,* 64 Cal.App.4th at p. 407 [noncompetition covenant invalid as a matter of law on demurrer].)

The instant case is analogous to *Dowell, supra,* 179 Cal.App.4th 564, where an appellate court held that a broadly worded noncompete clause was a facially void restriction on employees' practice of their chosen profession, where the clause prohibited employees, for a period of 18 months after termination of employment, from rendering services, directly or indirectly, to any competitor in which the services they might provide could enhance the use or marketability of a conflicting product by application of confidential information to which the employees had access during employment. (*Id*. at pp. 575, 577-578.) As do plaintiffs in this case, the employer in *Dowell* argued that the noncompete clause was valid because it was tailored to protect trade secrets. (*Id*. at pp. 575-576.) After discussing the questionable viability of the trade secret exceptions to covenants not to compete, the court held that, even assuming this common law exception still existed, the clause was not "narrowly tailored" or "carefully limited" to the protection of trade secrets. (*Id*. at pp. 576-579.)

Here, as in *Dowell,* the noncompete and nonsolicitation clauses of section 6 are not "narrowly tailored" or "carefully limited" to the protection of trade secrets but act as a restraint on McCune's mobility and the practice of her profession. Moreover, the

purpose of the instant noncompetition and nonsolicitation covenants does not appear to be the protection of trade secrets and other proprietary information, since section 6 makes no reference to trade secrets or even to confidential information. Indeed, another provision of the dealership agreement specifically addresses trade secrets.

Section 5, which immediately precedes the noncompetition and nonsolicitation covenants of section 6, is entitled "Trade Secrets" and it provides, in pertinent part, as follows: "BROKER acknowledges and agrees that any and all information concerning the insurance business developed by [Diversified] and acquired by BROKER while under contract, or in the employ of [Diversified] is and shall remain the sole property of [Diversified] and constitutes a secret and confidential communication." The section defines "trade secrets" very broadly, to include, among other things "without limitation thereto, names of clients and lists of properties as well as financial information pertaining thereto, files, records, and insurance policies maintained by [Diversified] including interoffice memoranda, mailing lists, manuals, forms, procedural information, and other records. . . ." The presence of this provision in the Agreement belies plaintiffs' claim that the noncompete and nonsolicitation provisions of section 6 must be seen as a necessary measure to protect trade secrets. (See *D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 935 [covenant not to compete could not be interpreted as requisite for protecting trade secrets where other provisions specifically and comprehensively addressed this issue]; see also *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1454 [requiring employees to sign confidentiality agreement is reasonable step to ensure secrecy].)

We conclude the noncompetition and nonsolicitation provisions of the amended Agreement were void under section 16600 and were not saved by any statutory or trade secret exception.

III. Severability of the Void Provisions

A. *Neither the buyout provisions nor the formula for valuing the parties respective shares in the book of business upon McCune's departure survives the voiding of section 6.*

Plaintiffs contend that even if the noncompetition and nonsolicitation provisions of section 6 and related amendments are void and unenforceable, they should be severed from the remainder of the agreement. The Agreement contains a savings clause stating in relevant part: "If any provisions of this Agreement shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, or unenforceable, such judgment shall not affect, imperil, or invalidate the remainder of this Agreement."

Defendants assert we should exercise our discretion to preclude the severance argument from being raised for the first time on appeal, as plaintiffs failed to raise it in the trial court. As Eisenberg points out, "[t]he rule barring new theories on appeal is limited to appeals *after trial*; it does not apply to trial court dispositions at the *pleading* stage. Thus, on appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, the court's review is not restricted to the theories asserted below; it will reverse if the complaint stated a claim for relief on *any* theory. [Citations.]" (Eisenberg et al., Civil Appeals and Writs (The Rutter Group 2011) ¶ 8:242, p. 8-160, citing *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 629-630; *20th Century Ins. Co. v. Quackenbush* (1998) 64 Cal.App.4th 135, 139.)

Plaintiffs contend that whether or not section 6 is void, McCune breached the contract by refusing to sell her vested interest in her book of business to plaintiffs, in failing to give 60 days' notice of her resignation, and in using trade secrets and confidential information co-owned by plaintiffs. They also contend that Saylor induced McCune's breach of contract. Finally, plaintiffs maintain that the factual allegations of partnership in the second amended complaint suffice to also allege a fiduciary duty owed by McCune and breached by her.

We reject any suggestion by plaintiffs that we should remake the contract so as to render the noncompetition and nonsolicitation provisions lawful. Numerous cases have

consistently refused to apply a savings clause to remake or rewrite an illegal covenant not to compete. Otherwise, "[e]mployers could insert broad, facially illegal covenants not to compete in their employment contracts. Many, perhaps most, employees would honor these clauses without consulting counsel or challenging the clause in court, thus directly undermining the statutory policy favoring competition. Employers would have no disincentive to use the broad, illegal clauses if permitted to retreat to a narrow, lawful construction in the event of litigation." (*Kolani, supra,* 64 Cal.App.4th at p. 408 [stating it had found no case approving the rewriting of an illegal covenant not to compete into a narrow bar on theft of confidential information]; *Dowell, supra,* 179 Cal.App.4th at p. 579 ["Any attempt to construe the noncompete and nonsolicitation clauses in such a manner as to make them lawful would not be reforming the contract to correct a mistake of the parties but rather to save a statutorily proscribed and void provision"]; *D'Sa, supra,* 85 Cal.App.4th at p. 935 [refusing to construe a covenant not to compete as a trade secret protection provision]; *Applied Materials, Inc. v. Advanced Micro-Fabrication Equip. (Shanghai Co.*) (N.D. Cal. 2009) 630 F.Supp.2d 1084, 1091 [having found assignment clause void under § 16600, court was not permitted to apply any narrowing construction to limit its application to confidential information].)

Consistent with the above principles, we believe that section 6 of the amended Agreement is *void in its entirety*, as are the amendments and addenda related to that section. This includes the provisions relating to the "buyout" by McCune of plaintiffs' interest in her book of business and the reciprocal buyout opportunities offered in the amended Agreement to plaintiffs. The buyout provision is an integral component of section 6 and cannot be separated therefrom without remaking the Agreement in a manner prohibited by the cases cited above. Indeed, the buyout provision contained in section 6 expressly acknowledged that it operated as to *release* McCune from the noncompetition covenant of that section.[5] Without the noncompete and nonsolicitation

[5] Section 6 of the Agreement provides in relevant part: "Upon payment in full pursuant to section (ii) above, BROKER shall be deemed released from the Covenant as to those clients for whom commissions were utilized in the calculations set forth above;

clauses, there is no clear, unambiguous, enforceable contract to sell a vested interest. Consequently, neither the buyout provisions nor the formula for valuing the parties' respective shares in the book of business upon McCune's departure survives the voiding of section 6.

B. *Other provisions are severable*

Nevertheless, the balance of the amended Agreement appears to be severable from the void noncompete and nonsolicitation provisions of the Agreement. Specifically, severable provisions include those reciting McCune's employment, duties and compensation, the parties' respective vested percentage of ownership of McCune's book of business, and the trade secrets provision of section 5. "It is settled that where a contract has both void and valid provisions, a court may sever the void provision and enforce the remainder of the contract. (Civ. Code, § 1599[6]; [citations]; Rest.2d Contracts, § 184, p. 30.) California cases take a very liberal view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered. (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §422, pp. 463-464, and cases cited therein.)" (*Adair v. Stockton Unified School Dist.* (2008) 162 Cal.App.4th 1436, 1450; see also *Thompson v. Fish* (S.D.Cal.1957) 152 F.Supp. 779, 779-780 [contract provision prohibiting employee from affiliating with competitor for unexpired term in event of termination before expiration of the contract violated § 16600, but provision was separable and did not render the entire contract void as "it relates solely to a condition which does not affect the terms of the contract of employment, but only the consequences of its termination"].)

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following such payment, [Diversified] shall not solicit business from said clients for a period of five (5) years from the date of termination."

[6] "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." (Civ. Code, § 1599.)

C. ***Claims of breach of contract, inducement of breach of contract, breach of fiduciary duties tied to nonsolicitation and noncompete clauses cannot stand***

We reject plaintiffs' assertion that they stated a valid breach of contract claim based on McCune's refusal to sell her vested interest in the book of business to plaintiffs or to buy their interest. Nor does plaintiffs' cause of action against Saylor for inducing McCune to breach the Agreement stand. In order to prevail on a claim for intentional interference with contractual relations, plaintiffs must show that Saylor engaged in an "independently wrongful act." (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148.) The complaint alleges that Saylor induced McCune to breach her agreement to sell her vested interest to plaintiffs and induced her to accept employment with Saylor. As we have determined, the provisions relating to selling her vested interest to plaintiffs and prohibiting her from employment with a competitor are void under section 16600, allegations that Saylor induced McCune to breach these covenants, cannot form the basis for a cause of action against Saylor for inducing such breach. (See *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 878-880.)

Plaintiffs further contend the independent wrongful act was Saylor's breach of its own confidentiality agreement and letter not to compete. However, the confidentiality agreement between Saylor and Diversified does not cover the situation that plaintiffs allege. It only purports to prevent Saylor and Diversified from disclosing confidential information about each other to *third* parties. It does not prevent Saylor from advising McCune not to sell her book of business.

Plaintiffs claim that the factual allegations of partnership in the second amended complaint are sufficient to state a cause of action for a breach of fiduciary duty by McCune. We disagree. To the extent the allegations of breach of fiduciary duty are linked to allegations that McCune was obliged to sell plaintiffs her share of the book of business, they cannot stand.

Plaintiffs also maintain that the factual allegations of "partnership" in the second amended complaint are sufficient to also allege a fiduciary duty owed by McCune and

breached by her. This claim is not persuasive, as we have previously determined the second amended complaint does not contain factual allegations sufficient support the conclusion that McCune and plaintiffs were partners in the firm or in anything other than her book of business.

D. ***Claims regarding misuse and misappropriation of confidential information based on the same nucleus of facts are preempted or superseded by CUTSA***

In addition to claims directly tied to the noncompetition and nonsolicitation clauses of the Agreement, plaintiffs alleged that before being hired by Saylor and before her resignation, McCune conspired with Saylor to use confidential client information to unfairly compete with plaintiffs and that McCune breached her fiduciary duty by placing her assistant with Saylor in order to take plaintiffs' clients. Plaintiffs further alleged that both before and after her departure, McCune breached her fiduciary duty to them by using confidential information to procure plaintiffs' clients to her own and Saylor's use and in converting the book of business, jointly owned with plaintiffs, to her own use. As to defendant Saylor, plaintiffs alleged Saylor used confidential information obtained during merger talks with Diversified to recruit McCune and her assistant and to hire them, and that Saylor breached its fiduciary duty to plaintiffs not to use or disclose confidential information to compete for clients or employees. (Plaintiffs did not allege a breach of contract cause of action against Saylor.) Plaintiffs also allege that by causing McCune's assistant to be hired by Saylor and Hill in order to take plaintiffs' clients and by conspiring to use confidential client information while still employed by plaintiffs, defendants unfairly competed with plaintiffs.

The foregoing allegations all involve the alleged misuse of trade secrets or alleged confidential information. As the same nucleus of facts underlies all of these claims, they are all preempted by California's Uniform Trade Secrets Act (Civ. Code, §§ 3426-3426.11) (CUTSA or UTSA). In *K.C. Multimedia*, *supra*, 171 Cal.App.4th 939, the Sixth Appellate District held that CUTSA "preempts common law claims that are 'based on the same nucleus of facts as the misappropriation of trade secrets claim for relief.' [Citation.]" (*Id.* at p. 958.) As explained by the court: "[a]t least as to common law

trade secret misappropriation claims, 'UTSA occupies the field in California.' (*AccuImage Diagnostics Corp. v. Terarecon, Inc.* [(N.D. Cal. 2003) 260 F.Supp.2d 941,] 954.)" (*K.C. Multimedia*, at p. 958.)[7]

CUTSA's preemption provision states that the act does not supersede "(1) contractual remedies, whether or not based upon misappropriation of a trade secret, [and] (2) other civil remedies that are not based upon misappropriation of a trade secret. . . ." (Civ. Code § 3426.7, subd. (b).) " 'At the same time, [section] 3426.7 implicitly preempts alternative civil remedies based on trade secret misappropriation.' [(*Trade Secrets Practice in Cal.* (Cont.Ed.Bar 2d ed. 2008) Litigation Issues, § 11:35, p. 430.)]" (*K.C. Multimedia, supra*, 171 Cal.App.4th at p. 954; accord, *Mattel, Inc. v. MGA Entertainment, Inc.* (C.D. Cal. 2011) 782 F.Supp.2d 911, 986 (*Mattel, Inc.*); *Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 236 (*Silvaco*), disapproved on other grounds in *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 337 ["We thus reaffirm that CUTSA provides the exclusive civil remedy for conduct falling within its terms, so as to supersede other civil remedies 'based upon misappropriation of a trade secret' "].)

Further, CUTSA supersedes not only claims that allege misappropriation of trade secrets, but also other common law claims alleging misappropriation of confidential information or premised on the wrongful taking of information that does not qualify as a trade secret, unless the plaintiff can identify some law that confers property rights protecting the information. (*Silvaco, supra,* 184 Cal.App.4th at pp. 236-240; see *Mattel, Inc. supra,*782 F.Supp.2d at pp. 985-987.) Consequently, a claim cannot simply depend

[7] "CUTSA has been characterized as having a 'comprehensive structure and breadth. . . .' [Citation.] 'Here, the eleven provisions of the UTSA set forth: the definition of "misappropriation" and "trade secret," injunctive relief for actual or threatened misappropriation, damages, attorney fees, methods for preserving the secrecy of trade secrets, the limitations period, the effect of the title on other statutes or remedies, statutory construction, severability, the application of title to acts occurring prior to the statutory date, and the application of official proceedings privilege to disclosure of trade secret information. [Citation.] That breadth suggests a legislative intent to preempt the common law. [Citations.]" (*K.C. Multimedia, supra*, 171 Cal.App.4th at p. 954.)

on a "different theory of liability" to survive CUTSA's preemptive effect. (*K.C. Multimedia, supra,* 171 Cal.App.4th at pp. 957-959.) "Depending on the particular facts pleaded, the statute can operate to preempt [claims of] breach of confidence, interference with contract, and unfair competition" and was held to have done so in *K.C. Multimedia.* (*Id.* at pp. 958- 959.)

The CUTSA therefore "preempts" all common law claims that are " 'based on the same nucleus of facts as the misappropriation of trade secrets claim for relief.' " (*K.C. Multimedia, supra,* 171 Cal.App.4th at p. 958, quoting *Digital Envoy, Inc. v. Google, Inc.* (N.D.Cal. 2005) 370 F.Supp.2d 1025, 1035). In other words, preemption generally applies where there is no material distinction between the wrongdoing underlying the CUTSA claim and the non-CUTSA claim. It is no longer the case in California that a claim for breach of fiduciary duty or duty of loyalty based upon the misappropriation of trade secrets would survive, even though both claims require proof of elements that are not part of the core trade secret misappropriation claim under CUTSA, like a relationship of trust or confidence. (*Mattel, Inc. v. MGA Entertainment, Inc., supra,* 782 F.Supp.2d at p. 986; see *K.C. Multimedia, supra,* 171 Cal.App.4th at p. 960.)

CUTSA does not preempt "other civil remedies that are not based upon misappropriation of a trade secret" or contractual or criminal remedies. (Civ. Code, § 3426.7, subdivision (b).) However, the causes of action for breach of contract, breach of fiduciary duty, inducement of contract breach, and unfair competition pleaded here were either tied to the void noncompete and nonsolicitation provisions and, therefore, were not sustainable or they were preempted by CUTSA, as they arose from the same nucleus of facts that might have given rise to a statutory cause of action for misappropriation of trade secrets.

Where does this leave us? The trade secrets provision of the contract is severable from the noncompetition and nonsolicitation provisions. However, as observed by the court in granting the demurrer, plaintiffs failed to plead a cause of action for misappropriation of trade secrets or to seek leave to amend to allege such claim. Rather, plaintiffs argued below, as they do here, that the noncompetition and nonsolicitation

provisions arose in connection with its attempt to protect its trade secrets, a justification we have rejected.

IV. Amendment to Allege Trade Secrets Claim/Unfair Competition

Plaintiffs contend that causes of action for misappropriation of trade secrets and unfair competition survive the severance of section 6 of the amended Agreement and that they should be granted leave to further amend their complaint on appeal in order to allege these causes of action. Defendants argue that plaintiffs should not be allowed for the first time on appeal to assert a new theory of the case where they did not seek to amend in the trial court on that basis. We recognize that doctrines of waiver and estoppel are grounded on principles of judicial economy and fairness to opposing parties. In the pleading stage these considerations are inapplicable, and on appeal from a demurrer, we search the facts to see whether they make out a claim for relief under any theory. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103; *20th Century Ins. Co. v. Quackenbush, supra,* (1998) 64 Cal.App.4th 135, 139, fn. 3 ["When a demurrer is sustained without leave to amend the petitioner may advance on appeal a new legal theory why the allegations of the petition state a cause of action"].) Consequently, it is recognized that the failure to request to amend in the trial court "is not an essential prerequisite to appellate relief from the demurrer dismissal. The requisite showing can be made for the first time on appeal. ([Code Civ. Proc.], § 472c, [subd.] (a)[8]; [citations].)" (Eisenberg et al., Civil Appeals and Writs, *supra,* ¶ 8:136.3a, p. 8-95, citing, among others, *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746-747 ["issue of leave to amend is always open on appeal, even if not raised by the plaintiff"]; *Kolani, supra,* 64 Cal.App.4th at p. 412 [criticizing the no-waiver rule but concluding "the Legislature in Code of Civil Procedure section 472c, subdivision (a), enacted the contrary rule, and we are bound by it"].)

[8] "(a) When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made." (Code Civ. Proc., § 472c, subd. (a).)

We also recognize that the burden of proving a reasonable possibility of amending the complaint so as to cure the defect rests " 'squarely on the plaintiff. [Citation.]' (*Blank v. Kirwan*[, *supra,*] 39 Cal.3d 311, 318.)" (*Leonard v. John Crane, Inc.*, *supra,* 206 Cal.App.4th at p. 1282.) Plaintiffs are entitled by statute to argue here that leave to amend should have been granted. (*Kolani, supra,* 64 Cal.App.4th at p. 410.) The question here is whether they have shown a reasonable possibility of amending the complaint to state a cause of action for misappropriation of trade secrets under CUTSA.

In their opening brief, plaintiffs argue they should be granted leave to amend on appeal in order to allege causes of action for unfair competition and misappropriation of trade secrets. However, plaintiffs *never* mention or cite to CUTSA in their opening brief. Rather, they leave it to their reply brief to assert, in a cagey turn of phrase, that they "never stated [in their opening brief] that they sought leave to add a common law cause of action for misappropriation of trade secrets instead of the statutory cause of action pursuant to the CUTSA." They maintain they "can allege both a CUTSA claim *and* a common law unfair competition claim." (Italics added.)

Plaintiffs argue they must be allowed to amend to allege an unfair competition cause of action, asserting that "the factual allegations for a cause of action for Unfair Competition mimic those required for misappropriation of trade secrets." As discussed above, plaintiffs are wrong that they may maintain a common law unfair competition claim based on the same nucleus of facts upon which they might posit a misappropriation of trade secrets claim.

As to the statutory claim for misappropriation of trade secrets, *Kolani, supra,* 64 Cal.App.4th 402, provides guidance. There, as here, plaintiffs never alleged a cause of action for misappropriation of trade secrets and did not seek leave to amend in the trial court. The Court of Appeal remanded to permit the plaintiffs an opportunity to file an amended complaint alleging a cause of action for misappropriation of confidential information. The *Kolani* court acknowledged that "[l]eave to amend is in general required to be liberally granted [citation], provided there is no statute of limitations concern. Leave to amend may be denied if there is prejudice to the opposing party, such

as delay in trial, loss of critical evidence, or added costs of preparation. [Citation.]" (*Id.* at p. 412.)

Here, as in *Kolani*, "the trial court's dismissal order explicitly acknowledged that appellants might have claims for misappropriation of confidential information and trade secrets." (*Kolani, supra*, 64 Cal.App.4th at p. 412.) We recognize that confidential client information may constitute a trade secret. (See *Alliant Insurance Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1306.) In sustaining the demurrer without leave to amend to the first, second, and third causes of action (breach of contract by McCune, inducement of breach of contract by Saylor, and breach of fiduciary duty by both McCune and Saylor) the court noted that "Plaintiff[s'] additional facts and argument regarding misappropriation of trade secrets may constitute a separate cause of action, but does not support the causes of action subject to demurrer here." The statute of limitations on such claims is three years. (Civ. Code, § 3426.6.) Although the complaint in *Kolani* "contained no separate cause of action captioned 'misappropriation of trade secrets,' it specifically alleged that [the defendant] 'removed confidential customer lists' and other confidential information" such that the new claims for misappropriation would " 'relate back' " to the filing of the original complaint. (*Kolani*, at p. 412.) Here, the second amended complaint alleged that Saylor had signed a confidentiality agreement "promising inter alia not to disclose confidential information and, implicitly, not to compete for personnel or clients using same"; that Saylor gained access to confidential information and used it as a basis to hire McCune and her assistant; and that Saylor conspired with McCune and her assistant to use confidential client information before McCune's resignation. As to McCune, the complaint alleged that she was entrusted with sensitive and confidential client risk, need, renewal, placement and pricing information that would be unknown to a competitor and that she and her assistant "had access to confidential information"; that she discussed confidential information about client status; and that immediately before and upon leaving plaintiffs and joining Saylor, McCune and her assistant used confidential information from plaintiffs' files to procure plaintiffs' clients from the co-owned book of business.

Given these allegations, we must conclude, as did the court in *Kolani, supra,* 64 Cal.App.4th at page 412, that "although the trial court correctly disposed of all claims which [plaintiffs] did assert, it should have allowed amendment to assert a statutory cause of action for misappropriation of trade secrets under CUTSA, absent some showing of prejudice (no prejudice analysis was made because [plaintiffs] did not seek leave to amend)."

V. Summary Judgment on the Promissory Estoppel Claim

Plaintiffs contend the trial court erred in granting summary judgment against them on their promissory estoppel cause of action against McCune. According to plaintiffs, McCune orally promised to work for HUB after the acquisition, to resign only upon retirement, and to sell her accounts to HUB upon her retirement. Plaintiffs identify the promise upon which this promissory estoppel cause of action is premised as McCune's 2007 promise that she would comply with the terms of the 1981 Agreement and the various addenda thereto, so that either she or her book of business would remain with the newly formed company and that plaintiffs should purchase her vested interest in her book of business on her resignation. In return, HUB also agreed to be bound by the amended Agreement. Plaintiffs maintain that this oral promise did not violate section 16600 and that plaintiffs relied upon the promise in proceeding with the merger and in setting aside $412,000 from the sale price to pay McCune.

" 'In California, under the doctrine of promissory estoppel, "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . ." [Citations.] Promissory estoppel is "a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced." ' (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) 'The purpose of this doctrine is to make a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange. If the promisee's performance was

requested at the time the promisor made his promise and that performance was bargained for, the doctrine is inapplicable.' (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 249.) *Accordingly, a plaintiff cannot state a claim for promissory estoppel when the promise was given in return for proper consideration. The claim instead must be pleaded as one for breach of the bargained-for contract.* (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 672-673; see *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1040-1041 [promissory estoppel appropriate only where no consideration for promise].)" (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 275, italics added.) Here, plaintiffs did not dispute that HUB also promised to abide by the Agreement. It is clear that McCune's promise was bargained for and that mutual promises were exchanged. Consequently, the doctrine of promissory estoppel is inapplicable. (*Ibid.*)

Furthermore, we have determined the noncompetition and nonsolicitation provisions of the amended Agreement were void as against the public policy set forth in section 16600 and any promise by McCune to sell her interest in her book of business to plaintiffs or purchase plaintiffs' interest in it were intertwined with the void provisions. Such agreement cannot be ratified by McCune's subsequent alleged oral promise to comply with those provisions of the amended Agreement. "An illegal contract is void; it cannot be ratified by any subsequent act, 'and no person can be estopped to deny its validity. [Citations.]' [Citation.] It is clear that estoppel cannot be relied upon to defeat the operation of a policy protecting the public. [Citation.]" (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 511, fn. omitted; see *WRI Opportunity Loans II, LLC. v. Cooper* (2007) 154 Cal.App.4th 525, 542 [loan guarantors could raise usury defense to void written loan guaranty notwithstanding that they had earlier waived other defenses]; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 432, pp. 473-474.)

Finally, as the trial court recognized in granting summary judgment, the evidence reflects that neither party complied with the buyout provisions of the amended Agreement. McCune did not offer to buy plaintiffs' purported interest in her accounts;

but neither did plaintiffs offer to pay McCune for her interest in those accounts.[9] The amended Agreement does not state what would happen if neither party elected to pay the other for their interest. Hence, the court had no basis for assessing what damages, if any, should be awarded based on McCune's alleged failure to comply with those provisions. (See, e.g., *Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 209 [contract terms were not reasonably certain where they failed to provide a basis for determining the existence of a breach and for giving an appropriate remedy].) This absence of an adequate basis for assessing damages is buttressed by the undisputed facts that after McCune resigned, HUB continued to collect commissions on the insurance contracts McCune wrote while employed with plaintiffs, but stopped paying McCune commissions on the contracts she had procured while employed by plaintiffs.

The court did not err in granting summary judgment/adjudication for McCune as to the promissory estoppel claim.

V. Attorney Fees (A132329)

Pursuant to Civil Code section 1717, the trial court awarded McCune attorney fees based on the contract of $63,960.30 for her defense of the breach of contract and promissory estoppel claims. Plaintiffs challenge the award of attorney fees to defendants for defending the breach of contract and promissory estoppel causes of action as "premature" and also contend the court erred in awarding attorney fees to McCune for work on the promissory estoppel cause of action. The contention that the attorney fee award is "premature" in the event we reverse the judgment is dispositive on this appeal. (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th

[9] Although plaintiffs disputed they had never sought to pay McCune for her interest in her accounts, they relied upon a declaration by Chuck Leone from Diversified, stating that Michael Mirsky of Saylor told him that Saylor "was not going to attempt to buy Marcia's Book of Business or try to comply with [the contract] in any way, because the contract was not enforceable" and that after speaking with Mirsky, plaintiffs considered "that any further attempts at compliance with the Agreement would be futile." That *Saylor* did not intend to purchase McCune's book of business, does not raise a disputed issue of fact as to defendants' assertion that neither plaintiffs nor defendants offered to pay the other for their interest.

1106, 1120 [because the trial court erred in sustaining demurrers to the first amended complaint without leave to amend, the award of costs and attorney fees to defendant based on that judgment must also be reversed].) Defendants *concede* that if this court does not affirm the judgment, "then the fee award as to the contract claim will be reversed for the time being, and the matter will be remanded for further proceedings." (See Civ. Code, § 1717, subd. (c).)[10]

As we reverse the judgment and remand to allow plaintiffs the opportunity to attempt to amend their complaint to assert a cause of action for misappropriation of trade secrets under the CUTSA, the judgment for attorney fees must also be reversed and remanded for redetermination following further proceedings below.

DISPOSITION

The judgment in case No. A131131 is reversed insofar as it precludes plaintiffs from filing an amended complaint alleging a cause of action for misappropriation of confidential information under CUTSA. The matter is remanded to permit plaintiffs an opportunity to plead such a cause of action. In all other respects, including the sustaining of the demurrers with prejudice to the first, second, third and fifth causes of action, the striking of the fourth cause of action for unfair competition, and the granting of summary judgment/adjudication as to the sixth cause of action for promissory estoppel, the judgment in case No. A131131 is affirmed. The judgment awarding attorney fees in case

[10] Civil Code section 1717, authorizing attorney fees for the prevailing party on a contract action when the contract provides for a fee award, states in subdivision (c): "In an action which seeks relief in addition to that based on a contract, if the party prevailing on the contract has damages awarded against it on causes of action not on the contract, the amounts awarded to the party prevailing on the contract under this section shall be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under this section exceeds the amount of damages awarded the party not prevailing on the contract, the net amount shall be awarded the party prevailing on the contract and judgment may be entered in favor of the party prevailing on the contract for that net amount."

No. A132329 is reversed and the matter remanded for further proceedings in accordance with the views set forth herein. The parties shall bear their own costs on appeal.

_____
Kline, P.J.

We concur:

_____
Lambden, J.

_____
Richman, J.